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263 NLRB No. 29

D--9091
Van Nuys, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEURO AFFILIATES d/b/a CROSSROADS HOSPITAL

and

Case 31--CA--12030

LOCAL 399 HOSPITAL AND SERVICE EMPLOYEES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL--CIO

DECISION AND ORDER

Upon a charge filed on March 29, 1982, by Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL--CIO, herein called the Union, and duly served on Neuro Affiliates d/b/a Crossroads Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on April 23, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 4, 1982, following a Board election in Case 31--RC--5029, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 15, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain ''affirmative defenses.''

On May 19, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 26, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

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[1] Official notice is taken of the record in the representation proceeding, Case 31--RC--5029, as the term ''record'' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent denies the request and refusal to bargain. Furthermore, in its answer and its response to the Notice To Show Cause, Respondent asserts that the Union's certification was improper on the basis of Respondent's objections to the election in the underlying representation proceeding. Respondent also contends that the Regional Director abused his discretion and violated Board rules by refusing Respondent's request for a hearing on its objections and by failing to send the entire record to the Board for review, and that the Board's failure to grant a hearing on its objections and review all of the evidence deprived it of due process.[2]

Review of the record herein, including the record in Case 31--RC--5029, reveals that an election conducted pursuant to a Stipulation for Certification Upon Consent Election on May 15, 1981, resulted in a vote of 36 for, and 17 against the Union, with 13 challenged ballots and 1 void ballot. Thereafter, Respondent filed timely objections to conduct affecting the results of the election, alleging, in substance, that (1) the Union attempted to entrap the Employer into committing serious

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[2] Respondent has requested oral argument. This request is hereby denied as the record, the General Counsel's Motion for Summary Judgment, and Respondent's brief in opposition to the Motion for Summary Judgment adequately present the issues and the positions of the parties.

unfair labor practices by challenging it to make written promises of benefits during the critical period; (2) the Union engaged in a scheme of mass challenges of only antiunion employees to discriminate against antiunion employees; (3) the Board agent conducting the election fostered the impression of bias by allowing the Union's challenges while precluding the Employer's election observer from making counter-challenges of prounion employees; and (4) the Union made material misrepresentations concerning the ownership and profitability of the Employer.

After investigation, the Regional Director issued his Report on Objections on July 23, 1981, in which he recommended that Respondent's objections be overruled in their entirety and that the Union be certified. Thereafter, Respondent filed timely exceptions to the Regional Director's report, in which it contended, inter alia, that the record should include all evidence compiled by or submitted to the Regional Director during the course of his investigation and that a hearing was warranted. On March 4, 1982, the Board, having considered the Regional Director's report, adopted the findings, conclusions, and recommendations of the Regional Director and certified the Union as the exclusive bargaining representative of the employees in the unit stipulated to be appropriate. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a

respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein, which it has not previously raised before the Board, which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[4]

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[3] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] In its answer, Respondent generally denies pars. 8 and 9 of the complaint, which allege that the Union, commencing on or about March 19, 1982, and continuing to date, has requested and is requesting Respondent to bargain collectively with it, and that commencing on or about March 15, 1982, and at all times thereafter, Respondent has refused to do so. However, counsel for the General Counsel has submitted in support of his Motion for Summary Judgment a copy of a letter, dated March 10, 1982, which the Union sent to Respondent, requesting a meeting to commence negotiations for a contract, and a copy of a letter, dated March 15, 1982, in which Respondent's attorney advised the Union that in view of Respondent's position that the election was invalid for the reasons set forth in its objections it was rejecting the Union's demand to commence bargaining. Respondent does not dispute the validity of these letters. Furthermore, although Respondent contends in its response to the Notice To Show Cause that substantial and material issues exist with respect to its objections, it does not argue that a factual issue has been raised as to the request and refusal to bargain. Furthermore, Respondent has not at any material time herein expressed a willingness to bargain with the Union. Finally, it is clear from its position set forth in its ''affirmative defenses'' and in (continued)

In this proceeding, Respondent contends that it is entitled to a hearing on its objections to the election. Prior to adopting the findings, conclusions, and recommendations of the Regional Director's Report on Objections, the Board considered the report, Respondent's exceptions thereto, and the entire record in that case. By its adoption of the report recommending that Respondent's objections be overruled, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.[5] Further, it is well established that the parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a prima facie showing of substantial and material issues which would warrant setting aside the election that it is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.[6] Accordingly, we grant the Motion for Summary Judgment.

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[4] its response to the Notice To Show Cause that Respondent asserts it has been, and continues to be, under no obligation to bargain with the Union. Accordingly, we find that Respondent's denials of pars. 8 and 9 of the complaint raise no substantial and material issues of fact warranting a hearing. We also find that Respondent's remaining denials in its answer raise no substantial or material issues of fact warranting a hearing.

[5] Madisonville Concrete Co., A Division of Corum & Edwards, Inc., 220 NLRB 668 (1975), enforcement denied 552 F.2d 168 (6th Cir. 1977); Evansville Auto Parts, Inc., 217 NLRB 660 (1975).

[6] GTE Lenkurt, Incorporated, 218 NLRB 929 (1975); Heavenly Valley Ski Area, a California Corporation, and Heavenly Valley, a Partnership, 215 NLRB 734 (1974); Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.] v. N.L.R.B., 424 F.2d 818, 828 (D.C. Cir. 1970).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Neuro Affiliates d/b/a Crossroads Hospital is, and has been at all times material herein, a joint venture duly organized under and existing by virtue of the laws of the State of California, with an office and place of business located in Van Nuys, California, where it is engaged as a health care institution in the operation of an acute psychiatric hospital. Respondent, in the course and conduct of its business operations, annually purchases and receives goods or services valued in excess of $5,000 from sellers or suppliers located within the State of California, which sellers and suppliers receive such goods in substantially the same form directly from outside the State of California. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $250,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

2. The certification

On May 15, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 4, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about March 10, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 15, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues

to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about March 15, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining

agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Neuro Affiliates d/b/a Crossroads Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 4, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 15, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Neuro Affiliates d/b/a Crossroads Hospital, Van Nuys, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay,

wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Van Nuys, California, facility copies of the attached notice marked ''Appendix.''[7] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 10, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

NEURO AFFILIATES d/b/a CROSSROADS HOSPITAL

(Employer)

Dated ---------- By ----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213--824--7357.